

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JAZMINE R., a Person Coming  
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

ALVIN R.,

Defendant and Appellant.

D043909

(Super. Ct. No. J511910-B)

APPEAL from a judgment of the Superior Court of San Diego County, Hideo Chino, Referee. Affirmed.

Alvin R. appeals a judgment terminating his parental rights to his minor daughter Jazmine R. under Welfare and Institutions Code section 366.26.<sup>1</sup> Alvin contends the

---

<sup>1</sup> Statutory references are to the Welfare and Institutions Code.

court erred by denying his section 388 petition for modification seeking to have Jazmine returned to his care, or alternatively, for further reunification services. Alvin also challenges the sufficiency of the evidence to support the court's finding the beneficial parent-child relationship exception did not apply to preclude terminating his parental rights. We affirm the judgment.

### FACTUAL AND PROCEDURAL BACKGROUND

In July 2002, two-month-old Jazmine became a dependent of the juvenile court under section 300, subdivision (b) based on findings her mother abused drugs. Jazmine's father Alvin had a lengthy criminal history and was incarcerated. The court removed Jazmine from parental custody and ordered Alvin, who was present at the disposition hearing, to comply with the requirements of his reunification plan, including counseling for domestic violence, a parenting education program and participation in the Substance Abuse Recovery Management System program (SARMS). That same day, Alvin was arrested on a federal warrant for a supervised release violation and later sentenced to 13 months in prison in Arizona.

Alvin was terminated from SARMS because he was incarcerated but he returned a completed prison parenting packet. He was enrolled in a parenting class but the prison facility did not offer anger management or domestic violence classes. He was scheduled to be released in three months. Jazmine was living with her maternal aunt and doing well in that placement.

The day after Alvin was released from prison, he escaped from a prison halfway house. He came to San Diego and contacted the aunt, who encouraged him to telephone

the social worker at the San Diego County Health and Human Services Agency (Agency) as soon as possible. Alvin failed to do so, but had two visits with Jazmine before being arrested. After being released, Alvin was again arrested and incarcerated for a state parole violation. During this time, Alvin did not contact the social worker or the aunt. Other than completing a parenting class while in federal prison, Alvin did not participate in any other services required by his case plan.

At the 12-month review hearing, Alvin remained incarcerated but was represented by counsel. The court found Alvin had not made substantive progress with his case plan, terminated services and set a section 366.26 selection and implementation hearing.

According to an assessment report, Jazmine's aunt had provided continuous care for her since Jazmine was one month old and she wanted to adopt her. Alvin had been released from prison and would remain on parole until April 2005. He was visiting Jasmine every day and was appropriate and loving during visits. During one visit observed by the social worker, Jazmine appeared comfortable and happy when Alvin kissed and cuddled her. She also seemed attached to the aunt.

The social worker believed Jazmine was adoptable due to her young age, amicable nature, physical attractiveness, good health and normal development. She was very bonded with the aunt and the aunt's child, and was thriving in this environment. An adoptive home study had been initiated. If this placement failed, there were 11 available families interested in adopting a child like Jazmine.

The social worker concluded there was no beneficial parent-child relationship between Alvin and Jazmine. Alvin was appropriate and loving with Jazmine but the

visits did not fully portray his parenting capabilities. Alvin had been incarcerated for most of Jazmine's life. He showed a limited understanding of her needs and did not have the ability to adequately parent her. Although Alvin completed classes in parenting, anger management and substance abuse, he did not understand the effect of his previous actions and was unwilling to take responsibility for them. He showed no commitment to long-term sobriety and a healthy lifestyle that would allow him to avoid committing crimes. In the social worker's opinion, Alvin's level of functioning showed he was not capable of providing Jazmine with the stability and security that she needed.

Alvin filed a section 388 modification petition seeking to have Jazmine placed with him, or alternatively, to vacate the selection and implementation hearing and reinstate services. In support of his petition, Alvin alleged he completed parenting classes, anger management and drug counseling while incarcerated and was amenable to continued services if the social worker believed he would benefit from them. As changed circumstances, Alvin claimed he has been actively involved in Jazmine's life for the past five months after his release from prison. He visited her consistently and frequently, sometimes three times a day, and had established a close, beneficial bond with her.

Alvin attached a bonding study conducted by Robert Kelin, Psy. D. Based on his observations, Dr. Kelin concluded Jazmine was bonded to Alvin and seemed to view him as a father figure. Although Jazmine was also bonded to the aunt, the bond with Alvin was stronger. Dr. Kelin believed it would hurt Jazmine to lose contact with Alvin.

The court found Alvin made a prima facie showing on his section 388 modification petition and granted an evidentiary hearing. Alvin testified that he had been

in and out of prison for the past year and during his incarceration, he contacted Jazmine by telephone. His convictions included being under the influence of controlled substances, attempted arson, trespass and "a few other misdemeanors." He "walked away" from custody and visited Jazmine while he was "on the run." The conditions of his parole for the next several years include registering as an arsonist once a year and drug testing once a month as well as at the request of his parole officer.

Alvin testified he did not participate in any services other than those required by conditions of parole. He planned to prevent drug relapse by avoiding people, places and things that trigger his old behaviors. Alvin acknowledged the social worker gave him referrals for counselors. He made some appointments but was unable to keep them because he had other things to do, such as work. Alvin said he was willing to participate in additional services.

Alvin presently lived with his mother and sister. After being released from prison, he worked one block from the aunt's home. He visited Jazmine several times a day, five or six days a week. Jazmine called him "Dada." During visits, he played with her, changed her diapers and fed her. He had a good relationship with the aunt, who agreed he could continue visits if she adopted Jazmine.

The aunt testified she had cared for Jazmine for nearly two years and had supervised Alvin's visits. When Alvin worked near her home, he visited Jazmine before and after work, five days a week. Since Alvin is no longer employed, his visits are not as frequent.

The aunt did not believe Alvin was ready to assume custody of Jazmine. During Alvin's visits, the aunt showed him how to take care of Jazmine. Alvin played with Jazmine, fed her, read books to her and changed her diapers and clothes. Jazmine went to Alvin for some of her needs and he responded appropriately. The aunt believed Jazmine had a positive relationship with Alvin and would be aware of losing contact with him. The aunt wanted to adopt Jazmine and was willing to continue her current visitation arrangement with Alvin.

Dr. Kelin testified consistently with his bonding study, stating Jazmine had a stronger bond with Alvin than with the aunt. His opinion was based on two observations during the bonding study: (1) Jazmine had a stronger tantrum when separated from Alvin than she did when separated from the aunt; and (2) when the aunt carried Jazmine into the waiting room following the separation exercise, she went to Alvin while she was still upset. Dr. Kelin characterized the relationship between Alvin and Jazmine as a parental one. He believed the bond was beneficial and it would be detrimental to Jazmine if the relationship were terminated.

On cross-examination, Dr. Kelin explained he defined the relationship between Alvin and Jazmine as a parental one because Jazmine looked to Alvin for help and support. He admitted a grandparent who lived in the home, or a nanny who regularly came to the home, could also have a parental relationship with a child.

At the close of Alvin's evidence, Agency successfully moved to dismiss the section 388 modification petition on the ground Alvin had not met his burden of showing changed circumstances and that granting the petition would be in Jazmine's best interests.

The court found Alvin was incarcerated during the reunification period because he chose to escape from custody and violate conditions of parole. Although Alvin visited Jazmine and established a relationship with her, this was only one factor in determining whether to return a child to parental custody. Further, had Alvin taken advantage of the referrals or services provided by Agency, the court might have reinstated reunification services.

The court acknowledged there was a relationship between Alvin and Jazmine, and that Dr. Kelin referred to it as a parental relationship. Nevertheless, the court found the relationship described by Dr. Kelin was not sufficient to grant Alvin's requests. Based on all the evidence, Alvin was not in a position to assume custody of Jazmine and returning her to Alvin would not be in her best interests. Moreover, Jazmine's best interests would not be served by continuing services for Alvin, given his failure to accept and participate in previous referrals and services.

At a contested selection and implementation hearing, the court took judicial notice of the testimony presented at the section 388 hearing and Dr. Kelin's bonding study. The court received into evidence Agency's assessment report.

Social worker Inga-Britt Ostrom testified she recommended terminating Alvin's parental rights and freeing Jazmine for adoption. Ostrom gave no weight to Dr. Kelin's bonding study because his observations in a 45-minute period were not sufficient to assess a bond or determine whether one bond was strong than another, especially given Jazmine's young age.

Ostrom observed Jazmine with Alvin and the aunt. Alvin was appropriate with Jazmine during visits. Jazmine and the aunt had a loving and caring relationship, and

Jazmine looked to the aunt to help her and to meet her needs. Jazmine lived with the aunt since she was a few weeks old, and she had never lived with Alvin. The aunt wanted to adopt Jazmine and was in the process of having a home study completed. There was no reason to believe the aunt would not be approved to adopt. Jazmine's routine would not likely change if parental rights were terminated.

After considering the evidence and hearing argument of counsel, the court found Jazmine was adoptable and the exception of section 366.26, subdivision (c)(1)(A) did not apply to preclude terminating Alvin's parental rights. Finding adoption was in Jazmine's best interests, the court terminated parental rights and referred Jazmine for adoptive placement.

## DISCUSSION

### I

Alvin contends the court erred by denying his section 388 modification petition<sup>2</sup> to have Jazmine returned to his care, or alternatively, for further reunification services. He asserts he showed: (1) changed circumstances and (2) granting his petition was in Jazmine's best interests.

### A

Under section 388, a party may petition the court to change, modify or set aside a previous court order. The petitioning party has the burden of showing, by a

---

<sup>2</sup> Although the court *dismissed* rather than *denied* the section 388 modification petition on Agency's motion, the effect was the same. Alvin does not challenge the court's ability to proceed in this manner, and we do not address it here.

preponderance of the evidence, that there is a change in circumstances or new evidence, and the proposed change is in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415-416.) Whether a previous order should be modified and a change would be in the child's best interests are questions within the sound discretion of the juvenile court. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318; *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1704.) The juvenile court's order will not be disturbed on appeal unless the court has exceeded the limits of legal discretion by making an arbitrary, capricious or patently absurd determination. When two or more inferences reasonably can be deduced from the facts, we have no authority to substitute our decision for that of the trial court. (*In re Stephanie M., supra*, 7 Cal.4th at pp. 318-319; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

When the court evaluates the appropriate placement for a child after reunification services have been terminated, its sole task is to determine the child's best interests. (*In re Stephanie M., supra*, 7 Cal.4th at p. 320.) In this context, the goal is to assure the child "stability and continuity." (*Id.* at p. 317.) The need for stability and continuity "will often dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child." (*Ibid.*) Thus, after the court terminates reunification services, "there is a rebuttable presumption that continued foster care is in the best interests of the child." (*Ibid.*)

## B

As changed circumstances, Alvin alleged he had maintained regular employment since his release from prison, established a strong and beneficial relationship with

Jazmine by visiting her frequently, completed classes in parenting and anger management while incarcerated, participated in drug counseling while incarcerated and drug tested regularly as a condition of parole. We agree that Alvin's circumstances had changed to the extent he developed a close relationship with Jazmine by visiting her consistently and frequently. However, other evidence showed Alvin's circumstances had not sufficiently changed. His job had ended and his visits with Jazmine had decreased when he no longer worked one block from the aunt's home. Alvin, who had a history of drug abuse, completed a drug counseling program but not a drug abuse treatment program. He had no plan for relapse prevention other than to avoid the people, places and things that triggered his drug use. Despite being given referrals for counseling, Alvin did not follow through because he had other priorities.

Further, Alvin had a lengthy criminal history and multiple parole violations that resulted in repeated incarceration for most of Jazmine's life. At the time of the hearing on his modification petition, he had been out of custody for only four months. Although Alvin showed his circumstances were "changing," he did not show they had "changed." (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610; *In re Casey D.*, *supra*, 70 Cal.App.4th at p. 48.) A petition that alleges merely changing circumstances does not promote stability for the child or the child's best interests because it would mean delaying the selection of a permanent home to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.) "Childhood does not wait for the parent to become adequate." (*In re Baby Boy L.*, *supra*, 24 Cal.App.4th at p. 610.)

Even if Alvin showed sufficient changed circumstances, he did not show modifying the court's previous order was in Jazmine's best interests. In support of his request to have Jazmine returned to his custody, Alvin relied on Dr. Kelin's bonding study to show Jazmine was strongly bonded to him and viewed him as a father figure, and it would be detrimental to terminate their relationship. However, Dr. Kelin, who observed Alvin and Jazmine for 45 minutes, did not give an opinion on Alvin's ability to parent Jazmine in an unsupervised setting or provide for her daily needs, nor did he state it would be in Jazmine's best interests to be returned to Alvin's care. Further, the aunt testified that although Alvin had a positive relationship with Jazmine and he responded appropriately to her, he was not ready to assume custody of Jazmine. Because the focus of the proceedings had shifted from reunification to Jazmine's stability and continuity, the court acted within its discretion by finding it was not in Jazmine's best interests to be returned to Alvin's care. (See *In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.)

Moreover, throughout the dependency proceedings, Alvin showed he was unable to comply with the conditions of his parole, resulting in multiple incarcerations. His failure to complete a drug abuse treatment program and participate in drug relapse prevention or counseling supported a finding it was not reasonably likely Alvin would successfully complete reunification services. (See *In re Christopher A.* (1991) 226 Cal.App.3d 1154, 1162.) Thus, the court acted within its discretion by denying Alvin's modification petition with respect to his request for further services.

## II

Alvin challenges the sufficiency of the evidence to support the court's finding the beneficial parent-child relationship of section 366.26, subdivision (c)(1)(A) did not apply to preclude terminating his parental rights. He asserts he maintained regular visitation and contact with Jazmine who would benefit from continuing the father-daughter relationship.

## A

We review the court's findings for substantial evidence. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we must uphold those findings. We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or determine where the weight of the evidence lies. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 52.) Rather, we "accept the evidence most favorable to the order as true and discard the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact." (*Id.* at p. 53.) The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947; *In re Geoffrey G.* (1979) 98 Cal.App.3d 3d 412, 420.)

"Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 573.) If the court finds a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds termination would be detrimental to the child under one of five specified exceptions. (§ 366.26, subd.

(c)(1)(A)-(E); see also *In re Erik P.* (2002) 104 Cal.App.4th 395, 401; *In re Derek W.* (1999) 73 Cal.App.4th 823, 826.)

Section 366.26, subdivision (c)(1)(A) is an exception to the adoption preference if termination of parental rights would be detrimental to the child because "[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." We have interpreted the phrase "benefit from continuing the relationship" to refer to a "parent-child" relationship that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; accord *In re Zachary G.* (1999) 77 Cal.App.4th 799, 811.)

To meet the burden of proof for this statutory exception, the parent must show more than frequent and loving contact, an emotional bond with the child or pleasant visits. (*In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.) "Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The relationship arises from the day-to-day interaction, companionship and shared experiences." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575, citation omitted.)

Although day-to-day contact is not required, it is typical in a parent-child relationship. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51.) The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment from child to parent. (*In re Autumn H.*, *supra*, at p. 575; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

## B

Here, the evidence showed Alvin frequently and consistently visited Jazmine for the four months preceding the selection and implementation hearing. However, Alvin did not meet his burden of showing there was a beneficial parent-child relationship sufficient to apply the exception of section 366.26, subdivision (c)(1)(A).

Dr. Kelin's conclusion that Alvin and Jazmine had a parent-child relationship was based on observing them for 45 minutes in a controlled setting. Dr. Kelin admitted Alvin's relationship with Jazmine was similar to that of a caretaker. In the social worker's opinion, Alvin and Jazmine did not have a beneficial parent-child relationship. Jazmine never lived with Alvin and he never had unsupervised or overnight visits with her so as to show he could attend to her day-to-day needs. In the social worker's opinion, Alvin had a limited understanding of Jazmine's needs. The court, who heard the testimony and observed the demeanor of the witnesses, was entitled to find the social worker credible and give greater weight to her assessment and testimony. We cannot reweigh the evidence or substitute our judgment for that of the trial court. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 53.)

Further, Alvin did not show the relationship he had with Jazmine was sufficiently beneficial to outweigh the benefits of adoption. The social worker believed adoption was in Jazmine's best interests. Jazmine had lived with the aunt since she was a few weeks old. She was bonded to the aunt and looked to her to meet her needs. Jazmine had a strong attachment to the aunt's daughter and had become an integrated member of the aunt's family. Although Jazmine would feel a loss if Alvin were no longer in her life, there was no showing she would be "greatly harmed." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) To require a parent show only "some, rather than great, harm at this stage of the proceedings would defeat the purpose of the dependency law." (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853.)

Jazmine, whose needs could not be met by Alvin, deserves to have her custody status promptly resolved and her placement made permanent and secure. After balancing the strength and quality of the parent-child relationship against the security and sense of belonging a new family would give Jazmine, the court found the preference for adoption had not been overcome. Substantial evidence supports the court's finding the exception of section 366.26, subdivision (c)(1)(A) did not apply to preclude terminating Alvin's parental rights. (See *In re Clifton B.* (2000) 81 Cal.App.4th 415, 425.)

#### DISPOSITION

The judgment is affirmed.

---

McCONNELL, P. J.

WE CONCUR:

---

MCDONALD, J.

---

IRION, J.